IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No. 17526 of 2005
To
SPECIAL CIVIL APPLICATION No. 17528 of 2005

For Approval and Signature:

HONOURABLE MR.JUSTICE DN PATEL

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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ROYAL COOPERATIVE BANK LTD. - Petitioner(s)
Versus
CHOKSHI TUBE CO. LTD. & 3 - Respondent(s)

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Appearance :
MR RAVINDRA SHAH for Petitioner. MRS KANAN R SHAH for Petitioner.
MR GC RAY for the Respondents.
MR HITESH N DAVE for the Respondents.

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CORAM : HONOURABLE MR.JUSTICE DN PATEL

Date : 29/09/2005

ORAL JUDGMENT

Rule. Learned advocate Mr.Hitesh N. Dave waives service of notice of Rule for respondents. Special Civil

Application no. 17526 of 2005 has been preferred against the common order dated 29th April, 2005 in Revision Application Nos. 109 to 111 of 2005 passed by the Gujarat State Co-operative Tribunal, Ahmedabad and Special Civil Application nos. 17527 and 17528 of 2005 have been preferred against the order dated 29.3.2005 passed by the Board of Nominees, Ahmedabad in Summary Lavad suit nos. 1906 of 2004 and 1907 of 2004 whereby, the contention of the respondent Choksi Tube Co. Ltd. was accepted and it is held that as the respondent no.1 is declared as an "undertaking" under The Bombay Relief Undertaking (Special Provisions) Act, 1958 (hereinafter referred to as "The Act of 1958") and therefore, leave to defend application for the said company in Lavad Summary suits should be kept pending till the notification of the Government of Gujarat declaring the respondent no.1 as an "undertaking" is in force.

2. The learned advocate for the petitioner mainly argued that the orders passed by the Tribunal and Board of Nominees are de hors the facts and law. The Tribunal and Board of Nominee have committed an error in interpreting section 4(1)(a)(iv) of the Act of 1958. The respondent no.1 is declared as an "undertaking"

under the provisions of the Act of 1958 by the Government Notification dated 28th February, 2005 which has to remain in force upto 27th February, 2006. (Annexure "C" to the memo of the petition). It is submitted by the learned advocate for the petitioner that there is no provision under the Act of 1958, whereby the liability of the respondent no. 1 cannot be crystalised or cannot be calculated or cannot be adjudicated upon. Crystalisation, calculation and adjudication of the right in the Lavad suits preferred by the petitioner is one thing and enforcement of such calculation or crystalisation or enforcement of adjudicated right (popularly known as a decree) is absolutely another thing. What is envisaged by the Act of 1958 is suspension of enforcement of right, privilege, obligation or liability accrued or incurred by such undertaking before it is so declared. In the present case, the Tribunal and Board of Nominees have not properly appreciated the aforesaid aspect of the matter and hence the orders passed by the Tribunal and Board of Nominees deserve to be quashed and set aside.

3. The learned advocate for the petitioner has also relied upon several judgments which will be referred

to hereinafter.

4. The learned advocate for the respondents has also relied upon the said clause, namely clause (iv) of sub-clause (a) of sub-section (1) of section 4 of the Act of 1958 and has submitted that any proceeding which is pending before any Court for enforcement of the right, privilege/obligation or liability against the respondent no.1 which is already declared as an "undertaking" on 28th February, 2005 deserves to be suspended. No such remedy can be availed so long as notification of the Government of Gujarat is in force. The respondent no.1 is an undertaking declared by the Government of Gujarat for a period of one year from 28th February, 2005 to 27th February, 2006 and therefore, the order passed by the Tribunal and Board of Nominees are absolutely in consonance with facts and law and therefore, the petitions may be dismissed.

5. The learned advocate for the respondents has also relied upon an unreported judgment of this Court in the case of Core Healthcare Ltd. vs. Standard Chartered Bank and another in Special Civil Application no. 131 of 2001 decided on 23rd January, 2001 reported in

2001(107) COMPCAS-501-GUJ. **The learned advocate for the respondents has also vehemently submitted that as per section 4 of the Act, no proceeding can be initiated against the respondent no.1, much less, by way of Lavad suit before the Board of Nominees, all types of proceedings before any Court, Tribunal, officer or authority has been stayed by the operation of law, that is, by section 4 of the Act of 1958.**

6. Looking to the aforesaid submissions, and considering the facts and circumstances of the case and nature of the orders passed by the Tribunal and Board of Nominee in my opinion, the impugned orders require to be quashed and set aside for the following facts and reasons.

(i) The petitioner bank has filed Lavad suits against the respondent no.1 who is principal borrower in Summary Lavad suit no. 1904 of 2004 and guarantor in Summary Lavad suit Nos. 1906 and 1907 of 2004. Leave to defend was sought for by the respondent no.1 Company in the suits. The Board of Nominees granted leave to defend to defendants by

imposing a condition of depositing 25% of the suit amount, whereas, the leave to defend application of the respondent no.1 company is kept pending because the respondent no.1 already declared as an "undertaking" under the Act of 1958 vide State of Gujarat notification dated 28th February, 2005.

(ii) Looking to the provisions of section 4 of the Act, the key words are "any remedy for the enforcement thereof". Sub-clause (iv) of clause (a) of sub-section (1) of section 4 of the Act of 1958 reads as under:

> **"4. Power to prescribe industrial relations and other facilities temporarily for relief undertakings (1) Notwithstanding any law, usage, custom, contract, instrument, decree, order, award, submission, settlement, standing, order or other provisions whatsoever, the State Government may, by notification in the Official Gazette direct that-**

(a)in relation to any relief undertaking and in respect of the period for which the relief undertaking continues as such under sub-section (2) of section 3-

(i) xxxx xxxx

(ii) xxxx xxxx

(iii) xxxx xxxx

(iv) any right, privilege, obligation or liability accrued or incurred before the undertaking was declared a relief undertaking and any remedy for the enforcement thereof shall be suspended and all proceedings relative thereto pending before any court, tribunal, officer or authority shall be stayed."

(Emphasis supplied.)

(iii) In view of the aforesaid provisions, what is envisaged by the Act is to stay enforcement of the right which has occurred

against the undertaking. The process of filing of the Summary Lavad suit is not the enforcement of the right, but the said process is a determination of the right or crystalisation of the right or adjudication of the right. If the Board of Nominees calculates the exact liability or crystalises the right or adjudicates the claim of the plaintiff, then such judgment will be delivered along with a decree and as per the provisions of Gujarat Co-operative Societies' Act, the order passed by the Board of Nominees, shall be deemed to be a decree enforceable under section 103 of the Act of 1961. There is also a provision under section 159 of the Act of 1961 for the enforcement of the crystalised right or adjudicated right. Whenever the question of enforcement of such type of crystalised or adjudicated right comes, such proceedings ought to be stayed during the pendency of the notification or during declaration of the "undertaking" under the Act of 1958. Filing of the Lavad suit is a claim of right by the original plaintiff. The Board of Nominee is

adjudicating the right. No question of enforcement of any right whatsoever arises till it is adjudicated upon. The adjudication of the right/obligation of liability, is one part of the process, whereas second part is enforcement of such adjudicated right/obligation/liability and this second proceeding deserves to be stayed as per section 4 of the Act of 1958.

(iv) Summary Lavad suit no. 1904 of 2004 was preferred by the petitioner against the respondents before the Board of Nominees, Ahmedabad under sections 96 and 99 of the Act of 1961, whereas, while granting leave to defend, the Board of Nominees passed an order for deposit of 25% of the amount involved in the Lavad suit by the other defendants who are respondent nos. 2 to 4. So far as application of leave to defend of respondent no. 1 is concerned, it was kept pending, on the ground of, it being declared as “relief undertaking” under the provisions of the Act of 1958 with effect from 28th February, 2005

upto the period of 27th February, 2006. Against this order, all the guarantors, that is, respondent nos. 2 to 4 had preferred Revision Applications before the Tribunal. The Revision Application No. 109 of 2005 preferred by the respondent no.1 company was allowed, whereas the Revision Application Nos. 110 of 2005 and 111 of 2005 preferred by the guarantors were dismissed and the leave to defend applications of the respondent no.1 company were kept pending till the notification of the Government which is at Annexure “A” to the memo of the petition which is dated 28th February, 2005 remains in operation. Being aggrieved by these orders, the present petitions have been preferred. Now, looking to the provisions of the Act of 1958, it is contended by the learned advocate for the respondents that all the proceedings initiated against the respondent no.1 which is declared as a “relief undertaking” which are pending before any Court, Tribunal, Officer or Authority must be stayed. This contention is not accepted by this Court mainly for the reason of the provisions of section 4 of the

Act, more particularly of section 4(1)(a)(iv). As per section 4(1)(a)(iv), the key words are "any remedy for the enforcement thereof shall be suspended and all proceedings relating thereto pending before any Court, Tribunal, Officer or Authority shall be stayed." It ought to have been appreciated by both the authorities below that filing of Lavad suit by the petitioner bank is nothing, but claim of a right. The claim of right is always in belligerent stage till it is adjudicated upon. Unless it is finally adjudicated upon by the concerned authority, there is no question of enforcement of any right, privilege/obligation or liability whatsoever arises. Therefore, what is envisaged to be stayed by section 4(1)(a)(iv) is a remedy for enforcement of any right, privilege, obligation or liability accrued. Mere filing of a suit can never tantamount to enforcement of right when the suit is yet to be adjudicated upon. As per section 103 of the Act of 1961, the certificate ought to be signed by the Registrar and it will be deemed to be a decree of a Civil Court as per section

2(ii) of the Code of Civil Procedure. Thus, when anybody is seeking enforcement of a decree, it could be labelled as a remedy for the enforcement of right, privilege/obligation or liability accrued, is pending before any Court, Tribunal, Officer or Authority and such remedy for such enforcement deserves to be stayed as per section 4 of the Act of 1958. But the process of crystalisation of right, or, process of adjudication of right is not required to be stayed at all.

(v) There is vast a difference between claim of right, privilege, obligation or liability and accrued right, privilege, obligation or liability. The claim of right can be enforced only when the competent court or Tribunal or authority has finally decided the claim and drawn a decree, more so as envisaged under the Act of 1961, more particularly under section 103 read with section 159 of the Act of 1961. Various methods have been provided by the Act of 1961 for the enforcement of adjudicated right, privilege, obligation or liability, but filing

of a Lavad suit is not a remedy for the enforcement of the right. Filing of a Lavad suit and adjudication thereof, therefore, cannot be stayed. This aspect of the matter has not been appreciated by both the authorities below.

(vi) It has been held by this Court in the case of **Saurashtra Chemicals Ltd. vs. Hon'ble Mr. Justice K.Ramamoorthy in Special Civil Application 7528 of 2004** delivered on May 13, 2005 that any remedy for the enforcement precludes the remedies which are for crystalisation of the right, privilege/obligation or liability. Section 4(1)(a)(iv) of the Act of 1958 enjoins not the stay of arbitration proceedings as arbitration proceeding is not a remedy for the enforcement of the right, privilege, obligation or liability. This section 4 has already been interpreted in the aforesaid decision. Para-13 of this judgment reads as under:

> "13. If statement and object of the Arbitration Act of 1996 and the BRU Act are read conjointly, it will appear that

the main statement and object of the Arbitration Act of 1996 is enacted for speedy resolution of disputes without intervention of the Courts. If the arbitration proceedings for ascertainment of the amount and the adjudication itself is stayed during the operation of the notification under Section 4 of the Act, in that case, the same will be contrary to the statement and object and the legislative intent of enacting the Arbitration Act of 1996. On the other hand, if the adjudication is permitted to go on in an arbitration proceeding and the meaning of the words “remedy for enforcement of right” is given to the extent that the proceedings at the time of execution of the award, if any, is required to be stayed if the Notification under section 4 of the Act is in operation, then in that case, it is not likely to affect the undertaking which is declared as a “Relief Undertaking” under the BRU Act as no prejudice will be caused to such

Undertaking, meaning thereby, by allowing the arbitration proceedings to go on and adjudication and ascertainment of amount, if any, is permitted, it is not likely to render any unemployment and/or closure of the undertaking. Under the circumstances, the learned Arbitral Tribunal has rightly held that the provisions of section 4 of the BRU Act only helps the concerned Undertaking with reference to enforcement of liability and “right”, privilege, obligation or liability, accrued or incurred can be adjudicated upon and the question of enforcement would arise only thereafter and the object of statute on a proper construction is that in respect of an Undertaking if those things are established the enforcement shall remain suspended. It is also further rightly held by the Arbitral Tribunal that after adjudication the SCL may succeed on merits and the claims may be rejected and in that event there will be no need for the SCL to project the notification

> in defence, and if the claim may be partly allowed and in the event of enforcement and if at that time the notification continues to be in force, the SCL may avail the benefit and the Court concerned with the execution of enforcement may consider this aspect."

Thus, it is clear from the aforesaid decision that the proceeding for the execution of the award, if any, is required to be stayed if notification under section 4 of the Act of 1958 is pending before any court or authority. Similarly, here also, whenever a Lavad suit is decreed, then only at the time of execution of the said decree, if any proceedings are pending and section 4 notification comes in operation, such proceedings are required to be stayed. The facts of the present case are different. Here, only the adjudication of right is going on and not the enforcement of any right, privilege, obligation or liability is pending before Court or Tribunal.

Similarly, it has been decided by this Court

in the case of **Bharat Overseas Bank Ltd. Vs. Ashima Ltd. Reported in 2004(2) GLH, 456 in para-39** as under:

"39. As stated earlier, the above provisions have come up for consideration before this Court in the case of M/s. D.S. Patel and Co. (supra) and the Division Bench in no uncertain terms, has held that a bare reference to Section 4 of the Act shows that the only restrictions which it contemplates is that of temporary suspension of the rights and liabilities relating to the relief undertaking in question. The wordings of sub-clause (iv) at first sight, give an impression that what is suspended is not only the remedy for the enforcement of the right to hold but also the right itself. This is, however, not so. On true construction of the said sub-clause, the right itself is not suspended but only the remedy for the enforcement of the right is suspended. It is, therefore, held that when the sub-clause speaks about suspension of a right, it only means suspension of its execution

> or enforcement. The incidents of a right, except its executability are, therefore , not suspended by the sub-clause. An act of presentation of post-dated cheque in the bank on its due date is one of the incidents of right which is not suspended and it can never be assumed to have reached the stage of executability."

6. As a cumulative effect of the aforesaid facts, reasons and judicial pronouncements, the common order dated 29th April, 2004 in Revision Application nos. 109 to 111 of 2005 passed by Gujarat State Co-operative Tribunal required to be quashed and set aside and are accordingly, hereby quashed and set aside. The orders dated 29th March, 2005 in Summary Lavad suit nos. 1904 of 2004 and Summary Lavad suit nos. 1906 of 2004 and 1907 of 2004passed by the Board of Nominees, Ahmedabad to the extent that leave to defend application of respondent no.1 should be kept pending is hereby quashed as the said application cannot be kept pending in view of the aforesaid observations and it ought to be decided by the Board of Nominees, Ahmedabad. The Board of Nominees, Ahmedabad is hereby directed to decide the leave to defend application of the

respondent no. 1 within four weeks from the date of receipt of writ from this Court. Rule made absolute accordingly in each petition with no order as to costs.

(D.N.Patel,J)

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